From: Jim Hill
To: Microsoft ATR
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Subject: Tunney Comments on PFJ in US v Microsoft

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Ms. Hesse:

I am submitting these comments by email since the Department is as affected by recent events as other governmental agencies. I am writing to comment on the proposed Final Judgment in US v Microsoft.

> "[T]he suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it." -- US v E.I. du Pont de Nemours & Co.

The proposed Final Judgment proposed to the Court by the United States Department of Justice and Microsoft fails to serve the public interest in too many ways to be an acceptable resolution to the case. While serving the public interest must be the primary goal of any resolution to this case, I note in passing that a crucial requirement of any system of justice must be that lawbreakers do not reap the rewards of their misconduct. The proposed Final Judgment fails to meet that goal as it is entirely forward-looking, albeit weakly so.

First, the proposed Final Judgment does not contain "any admission by any party regarding any issue of fact or law." This is unacceptable. Microsoft has broken the law. That is a fact decided by the District Court, upheld by the Appellate Court, and one which any resolution of this case must explicitly state. Independent civil proceedings will rely on the outcome of this case and it is critical that a declaration of lawbreaking be present.

The restrictions placed on Microsoft's business practices by the proposed Final Judgment appear at first glance to be sound but are so riddled with exceptions as to be effectively meaningless. With just a few minutes' thought, I was able to think of sidesteps by Microsoft that would neuter the restrictions and yet fall within the purview of the proposed Final Judgment. I am a layman; I can only imagine the ease with which Microsoft's legal staff can think of sidesteps -- especially when you consider that they wrote much of this proposed Final Judgment. For example, Microsoft is not required to "document, disclose, or license" anything that would purportedly hinder security or rights management. That's a gaping hole which would allow essentially all networking and multimedia protocols used in products folded into Windows to be completely undocumented. With the release of Windows 2000, Microsoft claimed that they had included Kerberos authentication mechanisms. They used empty data fields in an undisclosed manner to extend the Kerberos specification in a manner to provide authentication services between Windows servers and Windows clients which were denied to non-Windows clients. When pressed for details, the company asserted that their modifications were security-related and refused to disclose them. That conduct is still permitted by this proposed Final Judgment.

Further, the proposed Final Judgment appears to be totally ignorant of the free software movement (sometimes called "open source"). Neither term appears in the document, nor in the Competitive Impact Statement released later. Nearly all the proposed Final Judgment's provisions are predicated on commercial interests representing the only means of competition. Free software is not as a first principle about making money or gathering market share. It is a philosophical perspective that software can and should be shared so that it can be improved through the the ability and right of its users to correct errors, add features, or

provide superior implementations of algorithms. It is important to understand that by "sharing" I do not refer to the violations of intellectual property law best exemplified by the Napster service. This sharing is a decision made by the original programmer which permits or even requires redistribution of the source code (the human-readable information which is turned into the ones-and-zeroes of computers to be run as a program). The best known examples of this movement are the Linux kernel and the GNU tools that together provide a computing platform which can run on the same hardware as Windows and which provides a functional equivalent to the Unix operating system. Since the software in a Linux-based computer is largely written by noncommercial interests, the programmers would fail to meet the "business viability" requirement for licensing Microsoft intellectual property needed to allow interoperability -- said requirement to be ascertained by none other than Microsoft, in another of this proposed Final Judgment's absurdities. Also, since many of the free software programmers are hobbyists, they lack the financial resources to meet licensing terms that companies like Sun Microsystems or Apple Computer would doubtless find to be "reasonable and nondiscriminatory". Given that Linux-based systems represent the greatest competitive threat to Microsoft's desktop operating system monopoly right now, leaving the free software programmers and their software methodology out of the judgment throws away the single best option to restore competition to the marketplace.

The aspect of this proposed Final Judgment that most fails the "sniff test" is the compliance and enforcement section. For starters, the Technical Committee is a wholly inadequate enforcement mechanism. The fact that one of the three members is to be chosen by Microsoft and one chosen in part by that member means that half the committee will be of Microsoft's choosing. Prisoners do not get to select their jailers and Microsoft should not have any say in its overseers. The fact that such a farcical arrangement could even be suggested stems from the failure of the proposed Final Judgment to acknowledge expressly that Microsoft has broken the law. The enforcement mechanisms read like a partnership agreement, not the fettering of a lawbreaking monopolist.

Once selected, the Technical Committee's effectiveness is almost nonexistent. Three people, even with a staff to assist them, are not capable of auditing the tens of millions of lines of software that make up Windows and the Middleware produced by Microsoft. They cannot interview the thousands of Microsoft employees. They are also to be gagged from making public statements about their activities, a shame when simple public statements about Microsoft's conduct can influence that conduct. Staggeringly, the result of their work is not even admissible in enforcement proceedings! Of what possible value is this committee?

Finally, I object to the termination stipulation of the proposed Final Judgment. This wretched agreement will be in effect for five years, with the promise of up to two more years if Microsoft fails to comply with its terms. I find myself compelled to ask what reasonable person could refrain from paroxysms of belly-laughter at the idea that the solution to the failure of a five-year agreement is to extend that same agreement for two more years. The further damage to competition and the public that Microsoft could wreak by the end of that five-year agreement is almost incalculable. It took the company less than five years to annihilate not just Netscape but the commercial market for web browsers. Now that they have set their sights on messaging, home video games, multimedia such as audio and video, online shopping, personal video recorders, authentication services and more, how can the Department consider allowing the degree of autonomy that the proposed Final Judgment would?

I have barely scratched the surface of my objections to this proposed Final Judgment; I trust that others will address the shortcomings I have left out. I would like to take a moment to mention the utterly

disgraceful manner in which the United States government has betrayed the American people by throwing in the towel in US v Microsoft. After securing a thundering victory in the District Court and then accomplishing the coup of having that victory largely upheld by a unanimous decision of one of the country's more business-friendly Appellate Courts, settling the case with this pathetic excuse for a Final Judgment is contemptible. The career of the head of antitrust at Justice, Mr. James, is a history of justification for anticompetitive conduct and Attorney General Ashcroft is occupied with the September 11 attacks on the United States, but they are officials of the Department of Justice with obligations to the American people. The proposed Final Judgment comes nowhere near adequately discharging those obligations.

The Competitive Impact Statement required as a justification by the proposed Final Judgment has been released and it is as unenlightening as one would expect given the agreement that prompted it. University of Baltimore antitrust expert Robert Lande put it best when he said "I think Charles James is going to spend the next 30 years of his life saying 'I didn't sell out to Microsoft.'" The Competitive Impact Statement is as telling in what it doesn't say as in what it does say. The Department's repetition throughout the Competitive Impact Statement that the proposed Final Judgment restores competition and serves the public interest cannot make that statement true. Its recounting of the history of the case is accurate. Would that the actual impact statement were so. In truth, it reads as little more than a restating of the proposed Final Judgment with a bit more plain English and a bit less "legalese". At least, it reads that way until the end, when the Department tries vainly to justify this unconditional surrender. Their reasoning essentially boils down to "better a horrible conclusion today than a good one in two years." I take particular exception to this statement: "The remedies contained in the Proposed Final Judgment are not only consistent with the relief the United States might have obtained in litigation, but they have the advantages of immediacy and certainty." That is blatantly false. The District Court's ordered relief was far stricter than this settlement and the Appellate Court was quite clear that their reason for vacating that order was to preserve the appearance of impartiality. The newly assigned judge was expressly permitted to consider that very same ordered relief. The proposed Final Judgment may have "immediacy and certainty" but it is certain that Microsoft will immediately resume Business As Usual -- to the detriment of American citizens, businesses, governments. Given the feature-set of Windows XP, one could make a compelling argument that the company has _already_ resumed business as usual.

The Department of Justice had an opportunity to restore competition to an exciting industry that has been hobbled for too long by Microsoft's monopoly abuses. You had the support of two courts and you have come back with a settlement which isn't even a slap on the wrist: it's a loving caress. Shame on you all. You have a chance at redemption, however: withdraw the proposed Final Judgment. Return to Judge Kollar-Kotelly for the penalty hearings ordered by the Appellate Court when it disqualified Judge Jackson from rehearing that stage of the trial. Lay the evidence before her. Include Microsoft's actions since Judge Jackson issued his Findings of Fact, such as Microsoft's incorporation into Windows XP of multimedia players, instant messengers, and online shopping and let this case be ended by a judicial order that can only surpass the proposed Final Judgment in effectiveness.

Let me conclude this letter by reiterating my key points of objection to the government's proposed Final Judgment: it permits the monopolist to retain the fruits of its illegal acts. It provides no incentive for the monopolist to reform its business practices and thereby come into compliance with the requirements and restrictions of the Sherman Act. It ignores past harm to competition and does nothing to constrain future harm. It is in every way a betrayal of the Department's responsibility to the nation and is exceptionally painful given the smashing success the Department had in proving its case before the Court.

Thank you for your time.

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